IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

The New India Assurance Company Ltd. Vs Prakash Pulverising Mills Pvt. Ltd. & Anr.

S.B. CIVIL FIRST APPEAL No. 111/1981 against the judgment & decree dated dated 31.3.1981 passed by Shri S.R. Singh Bajwa, ADJ No.1, Jaipur city, Jaipur in Civil Original Suit No.89/77.

Date of Judgment :: August 22nd, 2006

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. B.P. Agrawal, Sr. Advocate with
Mr. R.P. Agrawal for the appellant.
Mr. B.L. Mandhana for the respondents.

REPORTABLE

BY THE COURT:

1. Machiavelli in his noted work, "The Prince" said, "I*t must be considered that there is nothing more difficult to carry out, not more doubtful of success, nor more dangerous to handle, than to initiate a new order of things".*

2. A case of Marine Insurance in desserts of Rajasthan evoked initial attraction of this Court but when the facts in a marshalled manner were shipped on the board of this Court, it revealed that respondent plaintiff M/s. Prakash Pulverising Mills Private Ltd. Company , imported

1600 bags of P.G. Red Oxide from M/s. Abdul Raza Jalaly of Bandar Abbas (Iran) for being transshipped from Iran to Mumbai and then were to be transported from Mumbai to Alwar in Rajasthan in the fateful ship “Naran Pasa” under its captain Qadir Hussan.

3. A little more dive into the sea of facts would be appropriate to decide this first appeal arising out of Civil Original Suit No.89/77 decreed in favour of plaintiff by the court of Shri S.R. Singh Bajwa, ADJ No.1, Jaipur City, Jaipur on 31.3.1981. The said goods under Bill of Lading dated 20.5.1976, Ex.8 and Invoice dated 23.5.1976, Ex.7 were consigned by Mr. Abdul Raza Jalaly who informed the plaintiff respondent vide his telegram Ex.11 dated 29.5.1976 that the goods had been ashiped by the said craft and the consignee may insure the same. On 11.6.1976, apparently in ignorance of the total loss accident of the said fateful ship “Naran Pasa”, the plaintiff respondent obtained a marine insurance policy called “lost or not lost”, a contract of 'uberrimae fidei', a contract of utmost good faith on 11.6.1976. It later on came in evidence before the learned trial court that the said unfortunate ship 'Naran Pasa' had run into rough weather on high seas near Karachi, Pakistan, broke into two and sank resulting in total loss on 10.6.1976 as per the statement of captain Qadir Hussan Dw.3 and another crew member Amin Hussan

Dw.4 who luckily survived, were arrested by Pakistani officials and were released only after about two years of their jail term in Pakistan and appeared in the witness box before the learned trial court in the present case also. Since the goods in question imported by the plaintiff respondent also apparently were totally lost, the plaintiff lodged its claim before the appellant insurance company by informing the the insurance company of the said total loss on 24.7.1976 in the first instance vide Ex.31. It may be noted here that the insurance policy Ex.10 was issued by the appellant insurance company on 23.9.1976 after intimation of the said total loss in pursuance of the cover note Ex.9 dated 11.6.1976.

4. The appellant insurance company contested the claim before the learned trial court mainly on the ground that there was a breach of condition No.9 of the insurance policy in the form that the goods in question had been shipped and sailed prior to the date of cover note i.e. 11.6.1976 and, therefore, on account of said breach of clause 9 of warranty the claim was repudiated. Before this Court, Mr. B.P. Agrawal, Senior Advocate, however, contested this on the ground of Section 20 of the Indian Contract Act, the point although urged before the learned trial court but found to have not raised in the pleadings that in view of the goods in question themselves having been lost on 10.6.1976, the contract was void on the

ground of mistake of fact in accordance with Section 20 of the Contract Act and, therefore, the claim was rightly rejected by the insurance company.

5. Mr. B.L. Mandhana, learned counsel appearing for the plaintiff respondent was at pains to support the impugned decretal judgment dated 31.3.1981 on the ground that the special enactment in the form of the Marina Insurance Act, 1963 would prevail over the general law contained in Indian Contract Act and Section 20 of the Contract Act was of no avail to the appellant insurance company. He emphasised that the said law envisaged coverage of liability with retrospective effect even if the goods were lost and unless there was an allegation of fraud and fraudulent withholding of information by the assured and the fact of loss of goods having already been within his knowledge, such contract under “lost or not lost” marine insurance policy saved the coverage in favour of assured and in the present case since there was nothing on record to establish that the plaintiff was even aware in any manner of the loss of goods in the total loss in an accident occurred on 10.6.1976, irrespective of the said fact, the plaintiff was entitled to recover the said claim from the insurance company.

6. It would be appropriate to reproduce the relevant provisions of Section 8 & 24 of the Marine Insurance Act,

1963 here:-

> "8. **When interest must attach**.- (1) The assured must be interested in the subject-matter insured at the time of the loss, though he need not be interested when the insurance is effected:
>
> Provided that, where the subject-matter is insured "lost or not lost", the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.
>
> (2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss."
>
> "24. **Contract must be embodied in policy**.- A contract of marine insurance shall not be admitted in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards."

7. Section 8 of the Act of 1963, particularly the proviso to sub-section (1) is very clear. The assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not. The gap of knowledge attributed to insurer and the insured is significant in the said proviso. The insurer in order to avoid its liability

under the said proviso has to specifically allege and prove that the fact of loss of goods insured was within the knowledge of the insured but withholding that the insurance company was not made aware of the same and thus misleading the insurer, the insurance in question was obtained by the insured. Nothing of this sort appears to have been even alleged by the insurance company much less established by the appellant insurance company in the present case. The insurance policy of “lost or not lost” issued in accordance with the terms of the contract specified in the Schedule to the said Act of 1963 clearly envisages coverage of insurance of loss even if such loss has occurred prior to issuance of the insurance policy. The contract of insurance admittedly being a contract of “uberriamae fidei”, a contract of utmost good faith, unless lack of such good faith is clearly established as a fact, the liability of insurance company cannot be denied on mere assumptions, suspicions or surmises or weak arguments like actual loss in fact having occurred prior to the obtaining of the insurance. The dates and facts in the present case about obtaining insurance on 11.6.1976 followed by issuance of the marine insurance policy on 23.9.1976 are beyond dispute and admitted facts by the appellant insurance company. The issuance of insurance policy on 23.9.1976 even after having been informed about the total loss by the plaintiff himself vide Ex.31 dated 24.7.1976 clearly clinches the issue in

favour of the plaintiff and even if some weakness in the claim of the plaintiff could be assumed for argument sake though there was none the same should be deemed to have been waived and ractified by the appellant insurance company upon issuance of the insurance policy on 23.9.1976.

8. The sheet anchor of the argument of appellant insurance company that there was violation of condition No.9 of the policy which reads, “warranted that the craft has not sailed earlier than the date of issue of cover note and no loss or damage has taken place prior to issue of cover note or policy, is firstly washed and watered down by condition No.2 of the same document which reads, “the risk attaches from the time the goods are loaded into the craft at the port named in policy and continues during the ordinary course of transit and terminates on discharges at the final port of destination or 4 days after the craft has anchored or moored at the final port of destination whichever is earlier”. Moreover, the cover note as well as insurance policy itself gives the particulars of the risk cover in which the description of goods including the date of invoice No.69/919 dated 23.5.1976 is noted by the insurance company. Therefore, the condition No.9 that the goods having been shipped prior to 11.6.1976, is waived on that very day when the insurance policy notices that the bill of lading and

invoice prior to the said date and still takes the risk coverage by accepting the premium. Moreover, the alleged warrantee in condition No.9 given by the plaintiff could be proved only with the help of proposal form which the insured plaintiff gave to the appellant insurance company. The learned trial court even did not find that document on record produced by the appellant insurance company and, therefore, naturally an adverse inference was drawn against the appellant insurance company and the plaintiff could not be said to have given any such warrantee, therefore, the repudiation of the claim by the appellant insurance company on the ground of alleged breach of condition No.9, was rightly not sustained by the learned trial court and the said view is affirmed by this Court.

9. Mr. B.P. Agrawal frankly and rightly conceded that in the written statement filed on behalf of the insurance company in additional pleas only the insurance company had stated in para 2 of additional pleas that the craft Naran Pasa had sailed on 20.5.1976 from Bandar Abbas, Iran while the insurance cover note was taken by the plaintiff and issued on 11.6.1976 and, therefore, the country craft has sailed earlier to date of issue of cover note and the loss or damage had taken place prior to issue of cover note or policy, however, nothing of the sort that the plaintiff had fraudulently withheld the

knowledge or information from the insurance company of total loss of goods prior to said date, had even been alleged and, therefore, nothing specific about invoking Section 20 of the Contract Act was stated in the written statement. In the absence of any such contest, no issue was framed by the learned trial court in this regard nor any evidence was led. It is too late in the day now at this stage after 25 years of the decretal judgment to allow the appellant insurance company to rake up such a contention which is without a foundation, as has been found by the learned trial court and rightly so in the opinion of this Court.

10. In support of his submission that the earlier part of the condition of marine insurance policy namely clause (2) as quoted above will prevail over clause (9), Mr. B.L. Mandhana relied upon the judgment of Hon'ble Supreme Court in case of **Kaivelikkal Ambunhi (dead) by L.Rs. & Ors. Vs. H.Ganesh Bhandary** [AIR 1995 SC 2491] in which Hon'ble Supreme Court while dealing with a case of rule of interpretation of a will held that for interpretation of documents for example a sale deed or gift deed or a mortgage deed or for that matter, any other instrument by which interest in immovable property is created, if there is any inconsistency between the earlier or the subsequent part of specific clauses inter se contained therein, the earlier part will prevail over the latter as

against the rule of interpretation applicable to a Will under which the subsequent part, clause or portion prevails over the earlier part on the principle that in the matter of Will, the testator can always change his mind and create another interest in place of the request already made in the earlier part or on an earlier occasion on the principle that it is the last will, which prevails. This Court feels that apparently clause (2) of the insurance policy in question will prevail over clause (9) breach of which has not even been established by the appellant insurance company.

11. Mr. B.P. Agrawal, on the other hand, relied upon the judgment of the Hon'ble Supreme Court in case of **M/s. Bihar Supply Syndicate Vs. Asiatic Navigation & Ors.** [AIR 1993 SC 2054] on para 21 of the said judgment wherein the Court held that it is the duty of the plaintiff to prove as a fact that the cargo was lost due to perils of the sea. Since the finding of the High Court in that case was that no sea water entered in the engine room and the fact that the cargo was intact even after the ship was towed to Vishakhapatnam showed that no sea water entered the ship and, therefore, the loss to the plaintiff was not on account of perils of the sea and the suit of the plaintiff against the insurance company was rightly dismissed by the High Court. The facts of the said case as well as ratio are apparently not applicable to the

facts of the present case where the ship was in question was admittedly totally lost including the goods loaded therein, due to weather of sea, which is undisputedly a peril of sea.

12. A little more scanning of the documents on record like Ex.27 the bill of exchange payable at sight showing the endorsement of S.B.B.J. of receiving payment on 11.6.1976 shows that the document of import in question were only received on being retired from the Bank on payment the plaintiff consignee on 11.6.1976 and, therefore, there was no question of his having any information of total loss of 10.6.1976 on 11.6.1976 when he obtained the insurance policy. The correspondence in the form of Ex.24 dated 11.8.1976, Ex.31 dated 24.7.1976 of the plaintiff to the appellant insurance company, Ex.25 dated 24.7.1976 telegram of Plaintiff to Surveyor -in- charge of Mercantile Marine Department, Ex.12 dated 11.7.1976 letter of plaintiff to M/s. Freight Carriers Pvt. Ltd. seeking clearance of goods in question, Ex.6 dated 11.6.1976 letter of S.B.B.J. about bill of exchange, Ex.5 letter of Bank dated 26.6.1976 (wrongly mentioned as 26.4.1976), Ex.15 dated 18.6.1976 of clearing agency Jyoti Trading Company asking for a sum of Rs. two lacs for payment of custom duty of the said consignment etc. clearly show that prior to 11.6.1976 and even thereafter for considerable period, the plaintiff

was not having any information of total loss of ship and goods on 10.6.1976, Ex.24 letter written by plaintiff to owner of ship on 11.8.1976 enquiring about the fate of ship as the goods in question were not received by that time despite considerable delay. In view of this overwhelming evidence, the denial of liability on the part of insurance company to pay the insurance claim to the plaintiff respondent appears to be clearly unjustified and unfounded. So, it is neither new order of things nor doubtful of success nor difficult to carry out as said by Machiavelli, while holding that defence of insurance company in the present case was devoid of merit.

13. Consequently, this Court finds that the present appeal of the appellant insurance company is devoid of merit and is liable to the dismissed. The same is accordingly dismissed with costs which is quantified to Rs.5,000/-. The insurance company is directed to pay the decretal amount with interest as directed by the learned trial court at the rate of 6% per annum.

(Dr. VINEET KOTHARI),J.

VS/